Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SHARON BURKYBILE,
PETITIONER

v.

BOARD OF EDUCATION OF THE HASTINGS-ON-HUDSON UNION FREE SCHOOL DISTRICT AND JOHN J. RUSSELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE HASTINGS-ON-HUDSON UNION FREE SCHOOL DISTRICT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals followed the precedent set by this Court in *McDonald v. West Branch*, 466 U.S. 284 (1984) when, in an action under 42 USC 1983, it affirmed the District Court's grant of summary judgment determining that petitioner's First Amendment retaliation claim was precluded by an award in a mandadory arbitration proceeding under New York Education Law relating to the discipline of tenured public school administrators.

PARTIES TO THE PROCEEDINGS

SHARON BURKYBILE, Ed. D., PETITIONER.

BOARD OF EDUCATION OF THE HASTINGS-ON-HUDSON UNION FREE SCHOOL DISTRICT, respondent.

JOHN J. RUSSELL, Individually and in his Official Capacity as Superintendent of the Hastings-on-Hudson Union Free School District.

This document is not filed by or on behalf of a nongovernmental corporation.

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CITATIONS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not yet published in official or unofficial reports. The opinion has been issued as a slip opinion in Docket No. 04-0905-cv, United States Court of Appeals for the Second Circuit and is attached hereto at Appendix (Appx. p. 1a). The District Court Judgment is attached hereto at Appx. p.18a.

BASIS FOR JURISDICTION IN THIS COURT.

The United States Court of Appeals for the Second Circuit issued its opinion on June 15, 2005. No rehearing was requested. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Civil Rights Act--42 U.S.C. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief

shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York Education Law, Article 61, section 2030-a is reproduced at Appx. p. 19a.

New York Civil Practice Law and Rules, Article 75, section 7511 is reproduced at Appx. p. 27a.

New York Civil Practice Law and Rules, Article 78, Section 7803 is reproduced at Appx. p. 29a.

STATEMENT OF THE CASE

This action was brought pursuant to U.S.C. 1983, The First Amendment to the Constitution of the United States, and 29 U.S.C. 791, et seq. Jurisdiction was conferred upon the District Court by 42 U.S.C. 1983 and 28 U.S.C. 1331 and 1343(3) and (4).

This petition seeks review of a decision of the United States Court of Appeals for the Second Circuit upholding a decision of the United States District Court for the Southern District of New York

The district court had dismissed petitioner's claim under 42 U.S.C. 1983, alleging retaliation for the exercise of petitioner's First Amendment rights. The district court held that the retaliation claim was precluded by an earlier hearing under Section 3020-a of the New York Education Law.

Burkybile and her immediate supervisor, respondent Russell, had a history of conflict. In October 2000, Burkybile received a poor performance evaluation from Russell, which Burkybile later rebutted in writing and at length. On December 1, 2000, Burkybile and Russell had a dispute at an official District dinner. Burkybile later filed a police report alleging that Russell grabbed her arm and shook her while verbally abusing her. Russell responded that an argument had arisen when Burkybile unreasonably refused to assist Russell with an emergency and potential crisis, but denied touching Burkybile. Later in December, Burkybile refused to approve a purchasing order for a replacement cell phone for Russell and canceled a business credit card, primarily in her name and secondarily in Russell's name, without notifying Russell.

On January 8, 2001, Burkybile spoke during a meeting of the defendant-appellee Board to accuse Russell of improper governmental actions. In response, the Board asked Burkybile not to attend future Board sessions and retained special counsel Ricki Roer to investigate Burkybile's accusations. On April 2, 2001, the Board decided to support Russell. Expressing a concern by Burkybile's behavior and possible mental instability, the Board placed Burkybile on paid leave on the same day.

Roer submitted her investigation report on April 26, essentially clearing Russell of fault and questioning Burkybile's job performance and professional judgment.

On May 21, 2001, the Board ordered Burkybile to submit to medical examination pursuant to New York Education Law § 913. Three doctors chosen by the Board conducted a series of examinations of Burkybile between August 21, 2001, and February 25, 2002, and between them diagnosed narcissistic disorder, borderline personality disorder, language problems, and possible indication of a degenerative brain condition known as Pick's Disease. These findings were controverted by Burkybile's three doctors. They diagnosed a depressive episode due to stress, adjustive disorder, and possible post-traumatic stress disorder, with significant improvement in symptoms over time.

The final medical report was completed on February 25, 2002. The next day, the Board found probable cause to bring a disciplinary proceeding against Burkybile based on charges brought by Russell, pursuant to Section 3020-a of the New York Education Law. A finding of probable cause initiates a disciplinary action under Section 3020-a. See N.Y. Educ. Law § 3020-a(2)(a). Upon receipt of the disciplinary charges, Burkybile requested a hearing under New York Education Law § 3020-a(3).

Burkybile filed the instant action on March 15, 2002, alleging, inter alia, infringement of her First Amendment rights in the form of retaliation by Russell and the Board for her accusations against Russell.

On June 24, 2002 the respondent board brought additional charges. In total, Burkybile faced eight charges, covering several dozen incidents and 154 specifications. The charges included mental disability,

incompetence, insubordination, neglect of duty, conduct unbecoming an administrator, and misconduct.

Respondents subsequently moved for summary judgment in the instant action. At Burkybile's request, the response to the motion was held in abeyance pending the outcome of the Section 3020-a hearing.

Burkbile and the Board proceeded to a Section 3020-a hearing. The hearing took place over fourteen days, spread out between November 7, 2002 and February 13, 2003. Five of the doctors who examined Burkybile testified, three for the Board and two for Burkybile. On July 18, 2003, the hearing officer issued a 153-page decision, finding that the Board proved all the charges brought against Burkybile, including the charge of mental disability and the vast majority of the specifications.

The hearing officer found that Burkybile was unable to perform her duties, was incompetent to a degree justifying termination, and had an unreasonably vengeful attitude towards Russell. He found just cause for discharge, and directed that Burkybile's employment be terminated.

Burkybile then filed a petition with the New York Supreme Court pursuant to Section 7511 of the New York Civil Practice Law and Rules. Section 7511 permits the New York Supreme Court to vacate an award for 1) corruption, fraud or misconduct; 2) partiality of the arbitrator; 3) exceeding the arbitrator's or agency's power or failing to make a final or definite award; or 4) failure to follow the procedures of Article 75. N.Y. C.P.L.R. § 7511. The petition was denied for

lack of any showing that the Section 3020-a hearing officer exceeded his power and lack of any allegation of fraud or bias.

Respondents then filed a letter memorandum with the district court arguing that under the doctrine of collateral estoppel, or issue preclusion, the present Section 1983 action was now precluded. The district court endorsed the memorandum, and granted summary judgment to defendants-appellees. The District Court's judgment reads:

JUDGMENT: ORDERED , ADJUDGED AND DECREED:

> That it is beyond dispute that the action is precluded, and that the defendant's motion filed on 04/25/2003 is granted, and the action is hereby dismissed.

Burkybile appealed. In the United States Court of Appeals for the Second Circuit she argued that the Section 3020-a hearing was in effect a labor arbitration, and therefore has no preclusive effect on subsequent judicial proceedings under the rule of *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984).

The Court of Appeals held: ". . . [T]hat the Section 3020-a hearing is a quasi-judicial administrative action whose findings are entitled to preclusive effect under *University of Tennessee v. Elliott*, 478 U.S. 788, 796-99 (1986)."

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

The United States Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

Access to the courts of the United States to vindicate the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States has been long considered important. This court observed in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972):

> [t]he very purpose of 1983 was to interpose the federal courts between the State and the people, as guardians of people's federal rights -- to protect the people from unconstitutional action under color of state law.

Of the rights to be protected, those under the First Amendment are especially pre-eminent. In this case the speech sought to be protected related to an issue of highest public importance -- the propriety of the manner of conducting the education effort in the nations public schools.

The decision of the Court of Appeals will have a broad impact as it affects the rights of hundreds of thousands of public school educators in the union's second most populated state, New York to speak freely on matters of the highest importance.

This Court has considered the question of "claim" or "issue preclusion" relating to previous arbitration in the context of Section 1983 actions of such importance that it has undertaken to settle the incumbent issues on numerous prior occaisions. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System*, Inc. 450 U.S. 728 (1981).

The decision of the Court of Appeals conflicts with the decision of this Court in *MCDonald v. West Branch*, 466 U.S. 284 (1984). In *McDonald* this Court iterated for the third time:

> On two previous occasions this Court has considered the contention that an award in an arbitration proceeding brought pursuant to a collective-bargaining agreement should preclude a subsequent suit in federal court. In both instances we reflected the claim.
>
> * * *
>
> Our rejection of a rule of preclusion in Barrentine and our rejection of a rule of deferral in Gardner-Denver were based in large part on our conclusion that Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes. 450 U.S., at 740 -746; 415 U.S., at 56 -60. These considerations

> similarly required that we find the doctrines of res judicata and collateral estoppel inapplicable in this 1983 action. 466 U.S. 284, 288 - 289

This Court has permitted arbitration agreements to foreclose access to federal courts. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991). In such a case the foreclosure of access to federal courts was born from *agreement.* The arbitration in the instant case does not arise from an agreement. The arbitration here is mandated by statute. *New York Education Law, Article 61, Section 3020-a.*

The Court of Appeals in it's opinion avoided the issue of deciding whether the Section 3020-a hearing was an arbitration and thus subject to the rule in *McDonald.* It opined:

> However, we need not decide here whether arbitrations have preclusive effect. Instead, we hold that because the Section 3020-a hearing was an administrative adjudication, we must give its findings preclusive effect. Burkybile points to several similarities between the Section 3020-a hearing and an arbitration: 1) the hearing officer is drawn from a list of labor arbitrators provided by the American Arbitration Association, N.Y. Educ. Law § 3020-a(3); 2) the hearing officer is paid a fee customary for an arbitrator, id. at (b)(i); 3) the hearing is reviewed under the arbitration-oriented

provisions of Article 75, rather than the agency-oriented provisions of Article 78, of the New York Civil Practice Law and Rules, N.Y. Educ. Law § 3020-a(5); 4) the subject matter of the hearing covers labor disputes normally handled by arbitration and serves as a substitute for labor arbitration, N.Y. Educ. Law § 3020; and 5) the hearing officer used arbitral standards to judge the conflicting medical evidence.

On the other hand, several factors demonstrate the administrative nature of the hearing: 1) the hearing was created by statute rather than private agreement, N.Y. Educ. Law § 3020-a; 2) the hearing is a disciplinary procedure that adjudicates charges against an employee rather than rights set by a private agreement; 3) the hearing procedures were set in part by statute, id. at § 3020- a(3), and in part by the state Commissioner of Education, id. at § 3020-a(3)(c)(i); and 4) the hearing was administered and paid for by the state Department of Education, id. at § 3020-a(3)(b)(1).

We hold that these facts, taken together, establish that the Section 3020-a hearing is an administrative adjudication that must be given preclusive effect. (Slip opinion, App. pp. 8-9)

Having determined that the Section 3020-a was an "administrative adjudication" Court of Appeals applied the rule of this Court in *University of Tenn. v. Elliott*, 478 U.S. 788, 796 (1986) which states that:

> When a state agency acting in a *judicial capacity* resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the state's courts. 478 U.S. 788, 799. (Italics added.)

This application of the *Elliott* test treats the arbitration, in which Petitioner was obliged by statute to participate, as though it were an "administrative adjudication" and then treats the "administrative adjudication" as though it were a "state agency acting in a judicial capacity". This interpretation ignores the observation of this Court that an "[a]rbitration is not a "judicial proceeding". *McDonald v. West Branch*, 466 U.S. 284, 288 (1984).

Were this a "state agency acting in a judicial capacity" it would be a state agency unfettered by the constraints that New York places on all other state agencies by New York Civil Law Procedure and Rules, Article 78, Section 7803. It requires judgment by a reviewing court to determine:

> whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion,

> including abuse of discretion as to the measure or mode of penalty or discipline imposed
>
> and
>
> whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.
>
> *CPLR Section 7803, Appendix.*

Affording a preclusive effect to a determination that may be made in violation of a lawful procedure, was affected by an error of law, may be arbitrary and capricious or an abuse of discretion, or may not be supported by substantial evidence would "severely undermine the protection of federal rights that the statute [42 U.S.C. 1983] is designed to provide." *McDonald v. West Branch*, 466 U.S. 284, 292 (1984).

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit and, ultimately, to vacate the grant of summary judgment and order of dismissal and further to remand the matter to the District Court for further proceedings; or to provide the Petitioner with such other relief as is fair and just in the circumstances.

Respectfully Submitted,

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Docket No. 04-0905-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SHARON BURKYBILE,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE HASTINGS-ON-HUDSON UNION FREE SCHOOL DISTRICT and JOHN J. RUSSELL, Individually and in his Official Capacity as Superintendent of the Hastings-on-Hudson Union Free School District,
Defendants-Appellees.

November 8, 2004, Argued

June 15, 2005, Decided

COUNSEL: ROBERT F. HELLMANN, Terre Haute, IN, for Plaintiff-Appellant.

JOAN M. GILBRIDE, Kaufman Borgeest & Ryan, LLP, Valhalla, NY, for Defendants-Appellees.

JUDGES: Before: WALKER, Chief Judge, and POOLER and WESLEY, Circuit Judges.

OPINIONBY: Pooler

OPINION: Pooler, Circuit Judge:

The facts in this case are largely uncontested. However, where facts are contested, we accept the plaintiff's account because this is an appeal from a grant of summary judgment.

Dr. Sharon Burkybile appeals from the January 5, 2004 order of the United States District Court for the Southern District of New York (Charles L. Brieant, J.) granting summary judgment to defendants-appellees Board of Education [*2] ("Board") of the Hastings-on-Hudson Union Free School District ("District") and John Russell, Superintendent of the District. The district court held that Burkybile's suit, brought under 42 U.S.C. § 1983, n1 was precluded by an earlier hearing conducted pursuant to Section 3020-a of the New York Education Law and dismissal of her petition for review of that hearing in New York Supreme Court under Section 7511 of the New York Civil Practice Law and Rules. Burkybile contends that the Section 3020-a hearing was a labor arbitration, and should not have any preclusive effect under the rule of McDonald v. City of West Branch, 466 U.S. 284, 292, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (198. . We hold that the Section 3020-a hearing is a quasi-judicial administrative action whose findings are entitled to preclusive effect under University of Tennessee v. Elliott, 478 U.S. 788, 796-99, 92 L. Ed. 2d 635, 106 S. Ct. 3220 (1986). We further hold that Burkybile waived any argument that her retaliation claim survived the Section 3020-a hearing, which resulted in a finding of just cause for Burkybile's termination. In any case, Burkybile failed to demonstrate a causal nexus between [*3] the exercise of her First Amendment rights and the initiation of the Section 3020-a hearing. We therefore affirm.

BACKGROUND

Burkybile was employed by the District beginning in 1991. For the next ten years, she served variously as Records Maintenance Officer, Assistant Superintendent for Business and Personnel, Deputy Superintendent and Purchasing Agent. During her tenure, Burkybile won numerous accolades and awards from independent organizations for her performance as a school administrator.

Burkybile and her immediate supervisor, defendant-appellee Russell, had a history of conflict. In October 2000, Burkybile received a poor performance evaluation [*4] from Russell, which Burkybile later rebutted in writing and at length. On December 1, 2000, Burkybile and Russell had a dispute at an official District dinner. Burkybile later filed a police report alleging that Russell grabbed her arm and shook her while verbally abusing her. Russell responded that an argument had arisen when Burkybile unreasonably refused to assist Russell with an emergency and potential crisis, but denied touching Burkybile. Later in December, Burkybile refused to approve a purchasing order for a replacement cell phone for Russell and cancelled a business credit card, primarily in her name and secondarily in Russell's name, without notifying Russell.

On January 8, 2001, Burkybile spoke during a meeting of the defendant-appellee Board to accuse Russell of improper governmental actions. In response, the Board asked Burkybile not to attend future Board sessions and retained special counsel Ricki Roer to investigate Burkybile's accusations. Between January 8, 2001, and

March 31, 2001, Burkybile conducted a vigorous campaign to support her accusations. This campaign included meeting with Roer, writing letters and providing documentation to Roer and the Board, and filing [*5] complaints with the New York State Attorney General and Comptroller.

On April 2, 2001, the Board decided to support Russell. Concerned by Burkybile's behavior and possible mental instability, the Board placed Burkybile on paid leave on the same day. Roer submitted her investigation report on April 26, essentially clearing Russell of fault and questioning Burkybile's job performance and professional judgment. On May 21, 2001, the Board ordered Burkybile to submit to medical examination pursuant to New York Education Law § 913. Three doctors chosen by the Board conducted a series of examinations of Burkybile between August 21, 2001, and February 25, 2002, and between them diagnosed narcissistic disorder, borderline personality disorder, language problems, and possible indication of a degenerative brain condition known as Pick's Disease. These findings were controverted by Burkybile's three doctors, who diagnosed a depressive episode due to stress, adjustive disorder, and possible post-traumatic stress disorder, with significant improvement in symptoms over time. Two of Burkybile's doctors and her lawyer were permitted to observe the examinations by the Board's doctors, and questioned [*6] the methodology of certain of those examinations.

The final medical report was completed on February 25, 2002. The next day, the Board found probable cause to bring a disciplinary proceeding against Burkybile based on charges brought by Russell, pursuant to Section

3020-a of the New York Education Law, which lays out extensive hearing and appeal procedures for disciplining tenured teachers and administrators in the New York state school system. Probable cause was found for additional charges on June 24, 2002. In total, Burkybile faced eight charges, covering several dozen incidents and 154 specifications. The charges included mental disability, incompetence, insubordination, neglect of duty, conduct unbecoming an administrator, and misconduct. A finding of probable cause initiates a disciplinary action under Section 3020-a. See N.Y. Educ. Law § 3020-a(2)(a). Upon receipt of the disciplinary charges, Burkybile requested a hearing under New York Education Law § 3020-a(3). Meanwhile, she filed the instant action on March 15, 2002, alleging, inter alia, infringement of her First Amendment rights in the form of retaliation by Russell and the Board for her accusations against Russell. [*7] Defendants subsequently moved for summary judgment. At Burkybile's request, the response to the motion was held in abeyance pending the outcome of the Section 3020-a hearing.

Burkybile and the Board proceeded to a Section 3020-a hearing to determine the appropriate penalty or other action. The hearing took place over fourteen days, spread out between November 7, 2002 and February 13, 2003. Five of the doctors who examined Burkybile testified, three for the Board and two for Burkybile. On July 18, 2003, the hearing officer issued a 153-page decision, finding that the Board proved all the charges brought against Burkybile, including the charge of mental disability and the vast majority of the specifications. The hearing officer found that Burkybile was unable to perform her duties, was incompetent to a

degree justifying termination, and had an unreasonably vengeful attitude towards Russell. He therefore found just cause for discharge, and directed that Burkybile's employment be terminated.

Burkybile then filed a petition with the New York Supreme Court pursuant to Section 7511 of the New York Civil Practice Law and Rules. Section 7511 permits the New York Supreme Court to vacate [*8] an award for 1) corruption, fraud or misconduct; 2) partiality of the arbitrator; 3) exceeding the arbitrator's or agency's power or failing to make a final or definite award; or 4) failure to follow the procedures of Article 75. N.Y. C.P.L.R. § 7511. The petition was denied for lack of any showing that the Section 3020-a hearing officer exceeded his power and lack of any allegation of fraud or bias.

Defendants then filed a letter memorandum with the district court arguing that under the doctrine of collateral estoppel, or issue preclusion, the present Section 1983 action was now precluded. The district court endorsed the memorandum, and granted summary judgment to defendants-appellees. This appeal followed. Burkybile argues that the Section 3020-a hearing was in effect a labor arbitration, and therefore has no preclusive effect on subsequent judicial proceedings under the rule of McDonald v. City of West Branch, 466 U.S. 284, 292, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984).

DISCUSSION

This Court reviews a grant of summary judgment de novo. Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121

(2d Cir. 2001). Summary judgment is appropriate if there are no [*9] genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

I. Preclusive Effect of the Section 3020-a Hearing

Burkybile contends that the Section 3020-a hearing was the equivalent of an arbitration, and that arbitrations are not given preclusive effect. We note that the preclusive effect of arbitrations is a difficult and complex issue. Ultimately, we do not reach that issue because we disagree that the arbitration-like features of the Section 3020-a hearing negate the hearing's status as an administrative adjudication.

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts must give state-court judgments the same preclusive effect as they would receive in courts of the same state. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984). However, neither arbitrations nor administrative adjudications are state-court judgments within the coverage of Section 1738. See University of Tenn. v. Elliott, 478 U.S. 788, 796, 92 L. Ed. 2d 635, 106 S. Ct. 3220 (1986); [*10] McDonald v. City of W. Branch, 466 U.S. 284, 287-88, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984). Nonetheless, in federal actions based on 42 U.S.C. § 1983, state administrative fact-finding is given the same preclusive effect as it would receive in courts of the same state. Elliott, 478 U.S. at 799. New York courts give quasi-judicial administrative fact-finding preclusive effect where there has been a full and fair opportunity to litigate. Ryan v. New York Tel. Co.,

62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823, 825-27 (1984); see also, Doe v. Pfrommer, 148 F.3d 73, 79-80 (2d Cir. 1998); Zanghi v. Incorporated Vill. of Old Brookville, 752 F.2d 42, 46 (2d Cir. 1985).

Burkybile contends that McDonald establishes that arbitrations are not given such preclusive effect. This contention, however, overlooks significant complexity. McDonald held that a labor arbitration would not preclude a subsequent Section 1983 action based on the same facts, in accordance with a line of cases beginning with Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974). n2 McDonald, 466 U.S. at 292. [*11] However, the McDonald line of cases has been called into question by a more recent line of Supreme Court cases that permit arbitration agreements to foreclose access to federal courts. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). This holding implicitly give arbitrations preclusive effect, and is thus closely intertwined with but not identical to the preclusion issue. We have reconciled McDonald and Gilmer as to the question of access to federal courts, but not as to preclusion. See Fayer v. Town of Middlebury, 258 F.3d 117, 121-22 (2d Cir. 2001); Rogers v. New York Univ., 220 F.3d 73, 75 (2d Cir. 2000). In other instances, we have given arbitrations preclusive effect without reference to McDonald, Gilmer, Rogers, or any related precedents. Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998); Benjamin v. Traffic Executive Ass'n E. R.R., 869 F.2d 107, 114 (2d Cir. 1989).

However, we need not decide here whether arbitrations have preclusive effect. Instead, we hold that because the Section 3020-a hearing was an

administrative adjudication, we must give its findings preclusive effect. Burkybile points to several similarities between the Section 3020-a hearing and an arbitration: 1) the hearing officer is drawn from a list of labor arbitrators provided by the American Arbitration Association, N.Y. Educ. Law § 3020-a(3); 2) the hearing officer is paid a fee customary for an arbitrator, id. at (b)(i); 3) the hearing is reviewed under the arbitration-oriented provisions of Article 75, rather than the agency-oriented provisions of Article 78, of the New York Civil Practice Law and Rules, N.Y. Educ. Law § 3020-a(5); 4) the subject matter of the hearing covers labor disputes normally handled by arbitration and serves as a substitute for labor arbitration, N.Y. Educ. Law § 3020; and 5) the hearing officer used arbitral standards to judge the conflicting medical evidence.

On the other hand, several factors demonstrate the administrative nature of the hearing: 1) the hearing was created by statute rather than private agreement, N.Y. Educ. Law § 3020-a; [*13] 2) the hearing is a disciplinary procedure that adjudicates charges against an employee rather than rights set by a private agreement; 3) the hearing procedures were set in part by statute, id. at § 3020-a(3), and in part by the state Commissioner of Education, id. at § 3020-a(3)(c)(i); and 4) the hearing was administered and paid for by the state Department of Education, id. at § 3020-a(3)(b)(1).

We hold that these facts, taken together, establish that the Section 3020-a hearing is an administrative adjudication that must be given preclusive effect. The hearing is undoubtedly very similar in form and procedure to an arbitration. However, the important fact is not that New York has seen fit to adopt the

proven procedures and methodologies of arbitration for the Section 3020-a hearing, but rather that these procedures are administered by a state agency. See Elliott, 478 U.S. at 799 (giving preclusive effect to actions of a "state agency acting in a judicial capacity" (internal quotation marks omitted)). So long as the parties have an adequate opportunity to litigate, the precise nature of the procedures that an agency uses to reach a determination does [*14] not affect the basic policies of finality and comity recognized by Elliott. See 478 U.S. at 798-99. In that case, the Supreme Court saw no reason to conclude that the Full Faith and Credit Act was intended to "foreclose the adaptation of traditional principles of preclusion to such subsequent developments as the burgeoning use of administrative adjudication." Id. at 797. Similarly, we see no reason to foreclose such adaptation simply because New York has chosen to conduct that adjudication using arbitral procedures.

Accordingly, we apply the Elliott test, which states that "when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the state's courts." Id. at 799 (internal quotation, citation, and indication of alteration from original omitted). As noted above, New York courts will give administrative determinations preclusive effect if made in a quasi-judicial capacity and with a full and fair opportunity to [*15] litigate the issue. Ryan, 478 N.Y.S.2d at 825-27. These tests are met here. Section 3020-a clearly authorizes a hearing officer to adjudicate questions of fact, charges, and penalties.

N.Y. Educ. Law § 3020-a(4). Burkybile's hearing properly adjudicated multiple charges of misconduct and determined that there was just cause for termination. Burkybile also had an adequate, full, and fair opportunity to litigate the question of cause for her termination. Section 3020-a lays out extensive litigation procedures for hearings, including motion practice, bills of particulars, mandatory disclosure, discovery, subpoena power, right to counsel, cross-examination, testimony under oath, and a full record. N.Y. Educ. Law § 3020-a(3)(c). This specific hearing occupied a total of fourteen days over a three-month period, and included the testimony of twenty witnesses, including five expert medical witnesses. The decision itself runs to over 150 pages and analyzes the evidence and arguments in extensive detail.

We have some concern over the hearing officer's use of an arbitral standard to judge the conflicting medical evidence that gave greater deference to the Board's experts [*16] than to Burkybile's. However, in this case, the hearing officer noted that such deference would be accorded only after Burkybile had failed to overcome the views of the Board's experts. In applying this standard, the hearing officer conducted a careful analysis of expert witness bias, credibility, credentials, and consistency. We conclude that because the hearing officer provided thorough and balanced reasoning in this case, the use of the inappropriate arbitral standard did not deny Burkybile an adequate, full, and fair opportunity to litigate. We therefore hold that the facts found at Burkybile's Section 3020-a hearing must be accorded preclusive effect.

II. Effect of Preclusion on the Retaliation Claim

We need not proceed any further to affirm the district court's order. Burkybile argues in her reply brief, but not her initial brief, that even if the findings of the hearing officer are given preclusive effect, those findings are not dispositive of her retaliation claim. Arguments raised for the first time in a reply brief are not properly before this Court, D'Alessio v. SEC, 380 F.3d 112, 120 n.11 (2d Cir. 2004), although we do have discretion to consider [*17] such arguments, Mitchell v. Fishbein, 377 F.3d 157, 165 (2d Cir. 2004). n3

Even if we were to consider this belated argument, we would hold that Burkybile's retaliation claim fails as a matter of law because the causal nexus between her accusations to the Board and the initiation of disciplinary proceedings is too attenuated. Under New York law, collateral estoppel bars the relitigation of "an issue clearly raised in a prior action or proceeding and decided against that party or those in privity." Ryan, 478 N.Y.S.2d at 826. Furthermore, "the issue must have been material to the first action or proceeding and essential to the decision rendered therein." Id. The record does not reflect that any constitutional claims were raised at the Section 3020-a hearing, so we do not take these as decided. See Taylor v. Brentwood Union Free Sch. Dist., 908 F. Supp. 1165, 1178 (E.D.N.Y. 1995). We do accept, based on the hearing officer's determinations, that Burkybile was terminated for just cause, was mentally disabled, and had demonstrated incompetence, insubordination, neglect, conduct unbecoming an administrator, and misconduct.

To state a prima facie claim of First Amendment retaliation under Section 1983, Burkybile must offer [*19] some tangible proof that 1) her speech was constitutionally protected; 2) she suffered an adverse employment action; and 3) a causal relationship between the two existed in that the speech was a substantial or motivating factor for the adverse employment action. Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999).

Burkybile can demonstrate the first two elements. First, speech that touches on a matter of public concern is constitutionally protected. Connick v. Myers, 461 U.S. 138, 145, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). Public accusations of improper governmental actions are clearly matters of public concern, regardless of whether the accuser is motivated by personal reasons. Second, an adverse employment action is one that "would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004) (internal quotation omitted). The threat of a Section 3020-a hearing could have such a deterrent effect. n4 See id. A Section 3020-a hearing permits suspension with pay and carries with it the threat of possible termination. N.Y. Educ. Law § 3020-a(2)(b). In this case, the hearing also caused Burkybile to incur the expense and inconvenience of extensive litigation, including the preparation of at least two expert witnesses. Such consequences are clearly deterrents for even a person of ordinary firmness. See Washington, 373 F.3d at 320 (holding that the threat of an administrative disciplinary hearing created at least an issue of fact as to the existence of an adverse employment action).

However, Burkybile cannot demonstrate the causal nexus required to state a prima facie retaliation claim. Burkybile and appellees would no doubt disagree over whether the findings of the Section 3020-a hearing disprove this causal element. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1976) [*21] (providing that an employer may disprove causation by showing that it would have acted in the same way even in the absence of the protected speech). More to the point, the passage of time and the Board's actions defeat any showing of causation. This Court has not established a specific delay between protected activity and adverse employment action that defeats an inference of causation. Gorman-Bakos v. Cornell Co-op Extension, 252 F.3d 545, 554-55 (2d Cir. 2001) (listing cases in the context of Title VII retaliation). We have in the past held that a delay of three months was fatal to a showing of causation, Hollander v. American Cyanamid Co., 895 F.2d 80, 85-86 (2d Cir. 1990), and that a delay of eight months supported a showing of causation, Grant v. Bethlehem Steel Corp., 622 F.2d 43, 45-46 (2d Cir. 1980). Here, more than a year passed between Burkybile's accusations before the Board and the initiation of disciplinary proceedings. Furthermore, the Board immediately appointed special counsel to investigate the accusations against Russell, and received a full investigative report. When appellees placed Burkybile on leave, they did [*22] so on a paid leave basis. They directed a series of medical examinations, as justified by the developing diagnoses, and permitted Burkybile's doctors to observe these examinations. Only after receiving the final medical report did appellees initiate disciplinary proceedings. All of these factors indicate good faith on the part of

appellees and destroy any inference of retaliatory animus.

Burkybile has thus failed to make any showing that her speech was a substantial or motivating factor for the initiation of the disciplinary action against her. We therefore conclude that we would not find any issue of material fact as to Burkybile's retaliation claim, and would find that summary judgment was properly granted to appellees.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Burkybile's initial complaint also alleged violations of the New York Whistleblower's Law, N.Y. Civ. Serv. Law § 75-b, and the federal Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796*l*). These claims have not been argued on appeal and we therefore do not address them.

n2 McDonald involved an arbitration award that had not been confirmed by a court. Appellees argue that McDonald is distinguishable on this basis alone. Again, this issue is more complex than the parties claim. We give the judicial Article 75 proceedings the same preclusive effect they would receive in New York courts. 28 U.S.C. § 1738. However, New York courts give even unreviewed arbitral findings preclusive effect. While this rule is not binding on federal courts

under Section 1738, it does make it unclear what preclusive effect is accorded to the Article 75 proceeding itself. Compare Bottini v. Sadore Mgmt. Corp., 764 F.2d 116, 121 (2d Cir. 1985) with Ritchie v. Landau, 475 F.2d 151, 155 (2d Cir. 1973). Because of the limited scope of review under Article 75, it is arguable that only the reviewed issues of corruption, partiality, exceeding authority, or lack of a definite award are precluded by an Article 75 confirmation. Cf. Gargiul v. Tompkins, 704 F.2d 661, 666 (2d Cir. 1983), vacated on other grounds, 465 U.S. 1016, 79 L. Ed. 2d 670, 104 S. Ct. 1263 (1984) (giving preclusive effect to an Article 78 proceeding, which at the time permitted broader review of Section 3020-a hearings).

n3 We also questioned, sua sponte, whether the preclusion of Burkybile's retaliation claim may divest both the district court and this court of jurisdiction under the Rooker-Feldman doctrine, and requested supplemental briefing on the issue. Since then, the Supreme Court has clarified that the Rooker-Feldman doctrine bars federal district court jurisdiction only over those actions filed by the loser in a state court action subsequent to the completion of that state court action seeking to overturn the judgment of the state court. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 161 L. Ed. 2d 454, 125 S. Ct. 1517, 1526 (2005). Here, Burkybile filed her federal action on March 15, 2002, well before any decision was rendered at any stage of Burkybile's state administrative or court proceedings. The Rooker-Feldman doctrine therefore has no application to this case, which is instead governed by the preclusion principles discussed in this opinion. See Exxon Mobil, 125 S. Ct. at 1527.

n4 Burkybile also identifies her removal from her office, involuntary leave, and disparagement of her name and reputation as adverse employment actions. Notably, her eventual termination is not so identified, as Burkybile's complaint was filed well before the Section 3020-a hearing even began.

U.S. District Court
Southern District of New York (White Plains)
CIVIL DOCKET FOR CASE #: 7:02-cv-02113-CLB

SHARON BURKYBILE,
Plaintiff,

v.

BOARD OF EDUCATION OF THE HASTINGS-ON-HUDSON UNION FREE SCHOOL DISTRICT and JOHN J. RUSSELL, Individually and in his Official Capacity as Superintendent of the Hastings-on-Hudson Union Free School District,
Defendants.

* * *

12/29/2003	35	JUDGMENT:...ORDERED, ADJUDGED AND DECREED: that it is beyond dispute that the action is precluded, and that the defendants motion filed on 04/25/2003 is granted, and that the action is hereby dismissed. EOD: 1/05/2004.(Signed by J. Michael McMahon on 12/29/2003) "The Clerk's Office Has Mailed Copies".(mov,) (Entered: 01/05/2004)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York Education Law, Section 3020-a

§ 3020-a. Disciplinary procedures and penalties. 1. Filing of charges. All charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, twenty-five hundred ninety-j, three thousand twelve and three thousand fourteen of this chapter shall be in writing and filed with the clerk or secretary of the school district or employing board during the period between the actual opening and closing of the school year for which the employed is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three and subdivision seven of section twenty-five hundred ninety-j of this chapter, no charges under this section shall be brought more than three years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed. 2. (a) Disposition of charges. Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists to bring a disciplinary proceeding against an employee pursuant to this section. If such determination is affirmative, a written statement specifying the charges in detail, the maximum penalty which will be imposed by the board if the employee

does not request a hearing or that will be sought by the board if the employee is found guilty of the charges after a hearing and outlining the employee's rights under this section, shall be immediately forwarded to the accused employee by certified or registered mail, return receipt requested or by personal delivery to the employee. (b) The employee may be suspended pending a hearing on the charges and the final determination thereof. The suspension shall be with pay, except the employee may be suspended without pay if the employee has entered a guilty plea to or has been convicted of a felony crime concerning the criminal sale or possession of a controlled substance, a precursor of a controlled substance, or drug paraphernalia as defined in article two hundred twenty or two hundred twenty-one of the penal law; or a felony crime involving the physical or sexual abuse of a minor or student. (c) Within ten days of receipt of the statement of charges, the employee shall notify the clerk or secretary of the employing board in writing whether he or she desires a hearing on the charges and when the charges concern pedagogical incompetence or issues involving pedagogical judgment, his or her choice of either a single hearing officer or a three member panel. All other charges shall be heard by a single hearing officer. (d) The unexcused failure of the employee to notify the clerk or secretary of his or her desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing. Where an employee requests a hearing in the manner provided for by this section, the clerk or secretary of the board shall, within three working days of receipt of the employee's notice or request for a hearing, notify the commissioner of education of the need for a hearing. If the employee waives his or her right to a hearing the

employing board shall proceed, within fifteen days, by a vote of a majority of all members of such board, to determine the case and fix the penalty, if any, to be imposed in accordance with subdivision four of this section. 3. Hearings. a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall forthwith notify the American Arbitration Association (hereinafter "association") of the need for a hearing and shall request the association to provide to the commissioner forthwith a list of names of persons chosen by the association from the association's panel of labor arbitrators to potentially serve as hearing officers together with relevant biographical information on each arbitrator. Upon receipt of said list and biographical information, the commissioner of education shall forthwith send a copy of both simultaneously to the employing board and the employee. b. (i) Hearing officers. All hearings pursuant to this section shall be conducted before and by a single hearing officer selected as provided for in this section. A hearing officer shall not be eligible to serve as such if he or she is a resident of the school district, other than the city of New York, under the jurisdiction of the employing board, an employee, agent or representative of the employing board or of any labor organization representing employees of such employing board, has served as such agent or representative within two years of the date of the scheduled hearing, or if he or she is then serving as a mediator or fact finder in the same school district. Notwithstanding any other provision of law, the hearing officer shall be compensated by the department with the customary fee paid for service as an arbitrator under the auspices of the association for each day of actual service plus

necessary travel and other reasonable expenses incurred in the performance of his or her duties. All other expenses of the disciplinary proceedings shall be paid in accordance with rules promulgated by the commissioner of education. (ii) Not later than ten days after the date the commissioner mails to the employing board and the employee the list of potential hearing officers and biographies provided to the commissioner by the association, the employing board and the employee, individually or through their agents or representatives, shall by mutual agreement select a hearing officer from said list to conduct the hearing and shall notify the commissioner of their selection. (iii) If the employing board and the employee fail to agree on an arbitrator to serve as a hearing officer from said list and so notify the commissioner within ten days after receiving the list from the commissioner, the commissioner shall request the association to appoint a hearing officer from said list. (iv) In those cases in which the employee elects to have the charges heard by a hearing panel, the hearing panel shall consist of the hearing officer, selected in accordance with this subdivision, and two additional persons, one selected by the employee and one selected by the employing board, from a list maintained for such purpose by the commissioner of education. The list shall be composed of professional personnel with administrative or supervisory responsibility, professional personnel without administrative or supervisory responsibility, chief school administrators, members of employing boards and others selected from lists of nominees submitted to the commissioner by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members other than the hearing

officer shall be compensated by the department of education at the rate of one hundred dollars for each day of actual service plus necessary travel and subsistence expenses. The hearing officer shall be compensated as set forth in this subdivision. The hearing officer shall be the chairman of the hearing panel. c. Hearing procedures. (i) The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. Hearings shall be conducted by the hearing officer selected pursuant to paragraph b of this subdivision with full and fair disclosure of the nature of the case and evidence against the employee by the employing board and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself or herself and an opportunity to testify in his or her own behalf. The employee shall not be required to testify. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer is hereby authorized to administer. A competent stenographer, designated by the commissioner of education and compensated by the state education department, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearings shall, upon request, be furnished without charge to the employee and the board of education involved. (ii) The hearing officer selected to conduct a hearing under this section shall, within ten to fifteen days of agreeing to serve as such, hold a pre-hearing conference which shall be held in the school district or county seat of the county, or any county, wherein the employing school

board is located. The pre-hearing conference shall be limited in length to one day except that the hearing officer, in his or her discretion, may allow one additional day for good cause shown. (iii) At the pre-hearing conference the hearing officer shall have the power to: (A) issue subpoenas; (B) hear and decide all motions, including but not limited to motions to dismiss the charges; (C) hear and decide all applications for bills of particular or requests for production of materials or information, including, but not limited to, any witness statement (or statements), investigatory statement (or statements) or note (notes), exculpatory evidence or any other evidence, including district or student records, relevant and material to the employee's defense. (iv) Any pre-hearing motion or application relative to the sufficiency of the charges, application or amendment thereof, or any preliminary matters shall be made upon written notice to the hearing officer and the adverse party no less than five days prior to the date of the pre-hearing conference. Any pre-hearing motions or applications not made as provided for herein shall be deemed waived except for good cause as determined by the hearing officer. (v) In the event that at the pre-hearing conference the employing board presents evidence that the professional license of the employee has been revoked and all judicial and administrative remedies have been exhausted or foreclosed, the hearing officer shall schedule the date, time and place for an expedited hearing, which hearing shall commence not more than seven days after the pre-hearing conference and which shall be limited to one day. The expedited hearing shall be held in the local school district or county seat of the county or any county, wherein the said employing board is located. The expedited hearing shall not be postponed except

upon the request of a party and then only for good cause as determined by the hearing officer. At such hearing, each party shall have equal time in which to present its case. (vi) During the pre-hearing conference, the hearing officer shall determine the reasonable amount of time necessary for a final hearing on the charge or charges and shall schedule the location, time(s) and date(s) for the final hearing. The final hearing shall be held in the local school district or county seat of the county, or any county, wherein the said employing school board is located. In the event that the hearing officer determines that the nature of the case requires the final hearing to last more than one day, the days that are scheduled for the final hearing shall be consecutive. The day or days scheduled for the final hearing shall not be postponed except upon the request of a party and then only for good cause shown as determined by the hearing officer. In all cases, the final hearing shall be completed no later than sixty days after the pre-hearing conference unless the hearing officer determines that extraordinary circumstances warrant a limited extension. 4. Post hearing procedures. (a) The hearing officer shall render a written decision within thirty days of the last day of the final hearing, or in the case of an expedited hearing within ten days of such expedited hearing, and shall forthwith forward a copy thereof to the commissioner of education who shall immediately forward copies of the decision to the employee and to the clerk or secretary of the employing board. The written decision shall include the hearing officer's findings of fact on each charge, his or her conclusions with regard to each charge based on said findings and shall state what penalty or other action, if any, shall be taken by the employing board. At the request of the employee, in determining what, if

any, penalty or other action shall be imposed, the hearing officer shall consider the extent to which the employing board made efforts towards correcting the behavior of the employee which resulted in charges being brought under this section through means including but not limited to: remediation, peer intervention or an employee assistance plan. In those cases where a penalty is imposed, such penalty may be a written reprimand, a fine, suspension for a fixed time without pay, or dismissal. In addition to or in lieu of the aforementioned penalties, the hearing officer, where he or she deems appropriate, may impose upon the employee remedial action including but not limited to leaves of absence with or without pay, continuing education and/or study, a requirement that the employee seek counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions. (b) Within fifteen days of receipt of the hearing officer's decision the employing board shall implement the decision. If the employee is acquitted he or she shall be restored to his or her position with full pay for any period of suspension without pay and the charges expunged from the employment record. If an employee who was convicted of a felony crime specified in paragraph (b) of subdivision two of this section, has said conviction reversed, the employee, upon application, shall be entitled to have his pay and other emoluments restored, for the period from the date of his suspension to the date of the decision. (c) The hearing officer shall indicate in the decision whether any of the charges brought by the employing board were frivolous as defined in section eight thousand three hundred three-a of the civil practice law and rules. If the hearing officers finds that all of the charges brought against the

employee were frivolous, the hearing officer shall order the employing board to reimburse the state education department the reasonable costs said department incurred as a result of the proceeding and to reimburse the employee the reasonable costs, including but not limited to reasonable attorneys' fees, the employee incurred in defending the charges. If the hearing officer finds that some but not all of the charges brought against the employee were frivolous, the hearing officer shall order the employing board to reimburse the state education department a portion, in the discretion of the hearing officer, of the reasonable costs said department incurred as a result of the proceeding and to reimburse the employee a portion, in the discretion of the hearing officer, of the reasonable costs, including but not limited to reasonable attorneys' fees, the employee incurred in defending the charges. 5. Appeal. Not later than ten days after receipt of the hearing officer's decision, the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the hearing officer pursuant to section seven thousand five hundred eleven of the civil practice law and rules. The court's review shall be limited to the grounds set forth in such section. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding. In no case shall the filing or the pendency of an appeal delay the implementation of the decision of the hearing officer.

New York Civil Law Practice and Rules Article 75, Section 7511

§ 7511. Vacating or modifying award. (a) When application made. An application to vacate or modify an award may be made by a party within ninety days after

its delivery to him. (b) Grounds for vacating. 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection. 2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that: (i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or (ii) a valid agreement to arbitrate was not made; or (iii) the agreement to arbitrate had not been complied with; or (iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502. (c) Grounds for modifying. The court shall modify the award if: 1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or 2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or 3. the award is imperfect in a matter of form, not affecting the merits of the controversy. (d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator

or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court. (e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

New York Civil Practice Law and Rules Article 78, Section 7803

§ 7803. Questions raised. The only questions that may be raised in a proceeding under this article are: 1. whether the body or officer failed to perform a duty enjoined upon it by law; or 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence. 5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

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No. 05-437

IN THE

Supreme Court of the United States

SHARON BURKYBILE,

Petitioner,

v.

BOARD OF EDUCATION OF THE HASTINGS-ON-HUDSON UNION FREE SCHOOL DISTRICT AND JOHN J. RUSSELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE HASTINGS-ON-HUDSON FREE SCHOOL DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Respondents Board of Education of the Hastings on the Hudson Union Free School District ("District") and John J. Russell ("Russell"), individually and in his official capacity as Superintendent (collectively "Respondents") submit this Opposition Brief in response to the Petition for a Writ of Certiorari filed by Petitioner Sharon Burkybile ("Petitioner" or "Burkybile").

Petitioner asserts that the Court should review the decision of the United States Court of Appeals for the Second Circuit affirming the dismissal of Petitioner's action alleging retaliation under 42 U.S.C § 1983 by the United States District Court, Southern District of New York. The District Court held that Petitioner's claim, based on an alleged violation of her First Amendment right to free speech, was precluded by a New York State judicial determination upholding a quasi-judicial administrative proceeding finding that there was just cause for Petitioner's discharge. The Court of Appeals found that the District Court properly applied the doctrine of collateral estoppel to preclude Petitioner from re-litigating issues that were decided against her in the quasi-judicial administrative proceeding, which was judicially reviewed and upheld by a New York State Court.

Petitioner's argument, however, ignores the legal reasoning of the lower courts, and misapplies the holding of the Court in *McDonald v. City of West Branch*, 466 U.S. 284 (1984), to the facts of this case. As the Court of Appeals found, the factual findings established in the underlying quasi-judicial administrative proceeding were established in a proceeding that afforded Petitioner a full and fair opportunity to be heard and, therefore, those findings are entitled to preclusive effect.

THE RECORD

The record shows that on March 15, 2002, Petitioner filed a Complaint in the District Court against Respondents. Her claims included an allegation of retaliation under 42 U.S.C. § 1983 based on an alleged violation of Petitioner's First Amendment right to free speech.

Petitioner's allegations against the District arise out of an apparent personal vendetta against Russell following a performance evaluation that was issued in October 2000 for the 1999-2000 school year. Petitioner disagreed with the content of this evaluation and initiated a pattern of rebuttal and attacks upon Russell, including allegations of "improper governmental acts."

On January 8, 2001, Petitioner addressed an Executive Session of the District Board of Education, articulating her accusations against Russell. Subsequent to that session, the District retained special counsel Ricki Roer ("Roer") to investigate the matter and meet with Petitioner. Petitioner continued her vigorous campaign to support her accusations against Russell. Roer recommended that Petitioner take some paid personal days off until the investigation was completed and the District had been afforded the opportunity to fully assess Petitioner's claim and any necessary actions. Roer ultimately concluded in an April 26, 2001 report that Petitioner had failed to raise concerns about Mr. Russell's actions and suggested that Petitioner's allegations were motivated by the October 2000 evaluation she received from Russell. Roer's report questioned Petitioner's job performance and professional judgment.

On April 2, 2001, in light of Petitioner's increasingly erratic and disruptive behavior, the District placed Petitioner on paid leave effective that date. On May 21, 2001, the District required that Petitioner submit to a medical examination pursuant to New York State Education Law § 913. A series of medical examinations were conducted that resulted in a diagnosis that Petitioner suffered from "a disabling level of neuropsychological impairment" that included a narcissistic disorder, borderline personality disorder, language problems, and indication of Pick's Disease, a degenerative brain condition.

On February 26, 2002, based on the medical evaluations, coupled with the uncharacteristic behavior that Petitioner had been exhibiting during the recent school year, the District unanimously found probable cause to bring disciplinary charges to remove Petitioner from her position as Deputy Superintendent, pursuant to a quasi-judicial administrative proceeding governed by New York Education Law § 3020-a ("3020-a"). Pursuant to § 3020-a(3), Petitioner requested a hearing on the disciplinary charges. The 3020-a hearing was not commenced in accordance with the terms of a collective bargaining agreement, and the hearing was not a mandatory arbitration proceeding.

The 3020-a hearing was the subject of fifteen days of testimony that concluded on February 13, 2003. Both sides were represented by counsel and had the opportunity to cross-examine witnesses and issue subpoenas. On July 18, 2003, the 3020-a hearing officer rendered his determination and found, in a 153 page decision, that a preponderance of credible evidence established that Petitioner was unfit for her position in the School District; that she was incompetent; insubordinate; neglected her duties; engaged in misconduct

and conduct unbecoming an Administrator; and that she suffers from a mental disability that inhibits her ability to perform the "essential functions" of her job. Significantly, the 3020-a hearing officer determined that the School District established 142 of 154 specifications brought against Petitioner and that given the "nature, extent and severity of the established allegations . . . termination from employment was warranted."

On July 31, 2003, pursuant to the 3020-a determination, the District met and voted to terminate Petitioner's employment. Thereafter, Petitioner filed an appeal in the New York State Supreme Court of the 3020-a determination pursuant to New York C.P.L.R. § 7511. On December 15, 2003, the New York Supreme Court denied Petitioner's appeal and upheld the 3020-a determination finding just cause to discharge Petitioner and dismissed Petitioner's petition to vacate and set aside the 3020-a hearing officer's award. The New York State Supreme Court found that the record clearly established that the determination of the 3020-a hearing officer had a rational basis based on the applicable statutory standards and that it was supported by substantial evidence. Further, the Court granted the District's request for an award of costs and reasonable attorneys' fees finding that Petitioner brought the appeal frivolously.

Prior to the 3020-a determination, on March 15, 2002, Petitioner had filed an action in the District Court, alleging, *inter alia*, that Respondents had infringed upon her First Amendment Rights in retaliation for Petitioner's accusations against Russell. On December 29, 2003, following the New York Supreme Court's denial of Petitioner's appeal, the District Court granted a pending summary judgment motion

on behalf of Respondents, finding "beyond dispute" that under the doctrine of collateral estoppel/issue preclusion, Petitioner's 42 U.S.C. § 1983 action was now precluded.

On June 15, 2005, the Court of Appeals upheld the District Court's finding that the 3020-a factual findings were entitled to preclusive effect. *Burkybile v. Bd. of Educ. of Hastings-On-Hudson Union Free School District, et al.*, 411 F.3d 306 (2nd Cir. 2005). The Court of Appeals confirmed that the 3020-a hearing is, in fact, "a quasi-judicial administrative action whose findings are entitled to preclusive effect." 411 F.3d at 308. Additionally, the Court of Appeals found that Petitioner waived her right to argue that her retaliation claim survived the 3020-a hearing. Finally, the Court of Appeals found that the preclusive nature of the 3020-a hearing would be dispositive of Petitioner's retaliation claim even had it survived, because the 3020-a hearing necessarily established that there was no casual relationship between Petitioner's protected speech and her termination.

REASONS FOR DENYING THE PETITION

I. PETITIONER HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reason." *Id.* Petitioner has not presented any compelling reason for this Court to exercise discretionary jurisdiction over her attempted appeal of the dismissal of her claim.

The Court of Appeal's affirmation of the New York State Supreme Court's finding that the § 3020-a hearing's factual determinations precluded Petitioner's claim was consistent with this Court's precedent in *University of Tennessee v. Elliot*, 478 U.S. 788, 796 (1986), and, as such, does not fall within the scope of the Court's ruling in *McDonald v. City of West Branch*, 466 U.S. 284 (1984).[1]

Petitioner has failed to address any of the theoretical underpinnings of the Court of Appeal's decision. Petitioner's position takes the conclusory position that the 3020-a hearing was an arbitration, and then points to *McDonald* for the proposition that an arbitration is not entitled to preclusive effect in a subsequent judicial proceeding.

Petitioner's argument fails, however, to consider that the Court of Appeals did not conclude, and Defendants have not argued, that the 3020-a hearing was an arbitration. In fact, the Court of Appeals specifically distinguished the 3020-a hearing from that of an arbitration. Petitioner has offered this Court no reason to question those distinctions. To the extent that this Court examined the preclusive effects of an arbitration in *McDonald*, the Court of Appeal's treatment of a different type of hearing, a quasi-judicial administrative action, does not fall within the scope of *McDonald*, and, therefore, cannot run afoul of its holding.

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1. We note also that the instant petition does not even technically fall within the ambit of any of the three considerations articulated by Rule 10. It appears that Sup. Ct. R. 10(a) would be closest to Petitioner's argument. This factor, however, deals with a Court of Appeal's decision that is in conflict with the decision of another Court of Appeal's decision. Petitioner has identified no such other Court of Appeal decision. Rather, Petitioner has alleged that the Court of Appeal's decision was in conflict with the precedent of this Court.

Similarly, Petitioner does not address the fact that in sharp contrast to the unappealed arbitration hearing examined in *McDonald*, the quasi-judicial administrative action here was specifically affirmed by the New York Supreme Court, an affirmation that is entitled to its own preclusive effect. The New York Supreme Court dismissed Petitioner's petition and found that the record clearly established that the 3020-a hearing officer had a rational basis for finding just cause to discharge Petitioner and that the hearing officer's determination was supported by substantial evidence. *See Dean Winter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985) (stating that *McDonald* held that "neither the full-faith-and-credit provision of 28 U.S.C. § 1738, nor a judicially fashioned rule of preclusion, permits a federal court to accord res judicata or collateral estoppel effect to an unappealed arbitration award in a case brought under 42 U.S.C. § 1983"). Therefore, once again, this Court's holding in *McDonald* is not impacted by the Court of Appeal's ruling in this matter.

Finally, the Court of Appeal, while raising some questions as to the holding of *McDonald* in light of subsequent rulings by this Court, explicitly recognized that *McDonald* was not impacted here because "we need not decide here whether arbitrations have preclusive effect. Instead, we hold that because the Section 3020-a hearing was an administrative adjudication, we must give its findings preclusive effect." 411 F.3d at 311.

Because the Court of Appeals did not examine a ruling similar to the one addressed in *McDonald* and because Petitioner has raised no argument that would bring the Court of Appeal's ruling within the purview of *McDonald*,

Petitioner has failed to provide this Court with any reason, compelling or otherwise, to exercise its discretionary jurisdiction over this matter.

II. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT A 3020-a HEARING IS A QUASI-JUDICIAL ADMINISTRATIVE ACTION WHOSE FINDINGS ARE ENTITLED TO PRECLUSIVE EFFECT

The Court of Appeals correctly applied the doctrine of collateral estoppel to preclude Petitioner's federal claims based upon the § 3020-a determination finding just cause to discharge Petitioner, and the New York State Supreme Court determination upholding the § 3020-a determination. The Court of Appeals found, and Petitioner has not disagreed, that the 3020-a determination is dispositive of the issues raised by Petitioner's Section 1983 claim. The sole argument raised by Petitioner here is that the 3020-a determination should not be granted preclusive effect.

The Court of Appeal's holding was based primarily on this Court's ruling in *University of Tennessee v. Elliot*, 478 U.S. 788, 796 (1986), which held that "in federal actions based on 42 U.S.C. § 1983, state administrative fact-finding is given the same preclusive effect as it would receive in courts of the same state." 411 F.3d at 310. Because the Court of Appeals determined that New York would give a 3020-a hearing, a quasi-judicial administrative adjudication, preclusive effect, *Id.*, it properly affirmed the lower court's ruling, consistent with the ruling of this Court. Moreover, in the present case, Petitioner's Section 1983 claim is precluded by both the 3020-a quasi-judicial determination and the New York Supreme Court determination upholding that determination.

In finding that 3020-a factfinding is preclusive, the Court of Appeals specifically addressed the concerns raised by this Court in *McDonald* that led this Court to find that an unappealed collective bargaining arbitration's factfinding should not be given preclusive effect. The Court of Appeals found that while there were certain surface similarities between a 3020-a hearing and an arbitration of the type examined in *McDonald*, there were significant differences that brought the 3020-a hearing outside the scope of *McDonald*. In particular, the Court of Appeals noted:

> [S]everal factors demonstrate the administrative nature of the hearing: 1) the hearing was created by statute rather than private agreement, N.Y. Educ. Law § 3020-a; 2) the hearing is a disciplinary procedure that adjudicates charges against an employee rather than rights set by a private agreement; 3) the hearing procedures were set in part by statute, *id.* at § 3020-a(3), and in part by the state Commissioner of Education, id. at § 3020-a(3)(c)(i); and 4) the hearing was administered and paid for by the state Department of Education, id. at § 3020-a(3)(b)(1).
>
> We hold that these facts, taken together, establish that the Section 3020-a hearing is an administrative adjudication that must be given preclusive effect.

Id. at 311-12.

The Court of Appeals noted, consistent with this Court's reasoning in *McDonald*, that it was not the "precise nature

of the procedures that an agency uses to reach a determination" that were telling. Rather, the key factors in evaluating whether preclusion is proper are that "these procedures are administered by a state agency" that ensures that "the parties have an adequate opportunity to litigate." *Id.* at 312. These factors are enunciated in the "*Elliot* test," cited by the Court of Appeals:

> [W]hen a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the state's courts.

Id. (quoting *University of Tennessee v. Elliot*, 478 U.S. 788, 799 (1986) (internal quotation, citation, and indication of alteration from original omitted)).

Here, these factors were clearly met and stand in stark contrast to the factors noted by this Court in *McDonald* regarding the unappealed collective bargaining arbitration at issue in that case. First, the Court of Appeals noted the statutory origin of the 3020-a hearing, as opposed to the contractually created arbitration hearing present in *McDonald*. *McDonald*, 466 U.S. at 290. In contrast to the aggrieved party in *McDonald*, who was represented by a labor union whose interests may not have aligned with his own, *McDonald*, 466 U.S. at 291, Petitioner had exclusive control over her defense and every personal incentive to assert that defense because her employment was at stake.

Further, pursuant to New York's statutory scheme, Petitioner, unlike the aggrieved party in *McDonald*, was able to and did appeal the 3020-a hearing officer's determination to the State Supreme Court.

Moreover, in contrast to the type of arbitration hearing examined in *McDonald*, where "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable," *Id.* (citation omitted), pursuant to the provisions of §3020-a, Petitioner was represented by counsel, and the hearing employed procedures substantially similar to those used in a judicial proceeding, including all testimony being under oath and Petitioner having the right to subpoena witnesses and to cross examine witnesses.

Finally, after a hearing that lasted fifteen days, the 3020-a hearing officer issued a detailed 153 page decision explaining its ruling. The Court of Appeals recognized that the 3020-a hearing provided Petitioner with a full and fair opportunity to litigate the issues she wishes to re-litigate in federal court.

While addressing none of the factors that differentiate the 3020-a hearing from the type of hearing addressed in *McDonald*, Petitioner's sole attack on the reliability of the 3020-a hearing is her contention that the New York statutory scheme recognizes that a 3020-a hearing could, theoretically, result in "a determination that may be made in violation of a lawful procedure, was affected by an error of law, may be arbitrary and capricious or an abuse of discretion, or may not be supported by substantial evidence." [Pet'r App. 12]

This reasoning, however, ignores in full a 3020-a party's right to appeal, as Petitioner did here, the results of a 3020-a determination in New York's Supreme Court. Here, the New York State court reviewed Petitioner's case and dismissed her case, noting "the lack of any showing that the [3020-a] hearing officer exceeded his power and lack of any allegation of fraud or bias." 411 F.3d at 310. Therefore, the very factors that Petitioner suggests may be lacking in the 3020-a determination were not only considered by a state court, but also rejected. Therefore, Petitioner has raised no valid concern as to the validity and preclusive effect of the 3020-a determination.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari filed by Petitioner be denied.

Respectfully submitted,

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